



U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE REPUBLICANS

February 25, 2019

TO: Republican Members, Committee on Energy and Commerce

FROM: Committee Minority Staff

RE: Hearing entitled “EPA’s Enforcement Program: Taking the Environmental Cop Off the Beat.”

The Subcommittee on Oversight and Investigations will hold a hearing on Tuesday, February 26, 2019, at 10:30 a.m. in 2322 Rayburn House Office Building entitled, “EPA’s Enforcement Program: Taking the Environmental Cop Off the Beat.”

I. WITNESSES

Panel I

- The Honorable Susan Bodine, Assistant Administrator, Office of Enforcement and Compliance Assurance (OECA), U.S. Environmental Protection Agency.

Panel II

- The Honorable Ronald J. Tenpas, Partner, Vinson & Elkins Law Firm; Former Assistant Attorney General for the Environment and Natural Resources Division of the U.S. Department of Justice;
- Bruce Buckheit, JD, MS, Energy and Environment Consultant; Former Director, Air Enforcement Division, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency;
- Bakeyah Nelson, PhD, Executive Director, Air Alliance Houston;
- Eric Schaeffer, JD, Executive Director, Environmental Integrity Project;
- Chris Sellers, PhD, MD, Professor of History; Director, Center for the Study of Inequality and Social Justice, StonyBrook University; and
- Jay Shimshack, PhD, Associate Professor of Public Policy and Economics, Frank Batten School of Leadership and Public Policy, University of Virginia.

II. BACKGROUND

a. EPA's Enforcement of Environmental Laws Over the Past Decade

The Office of Enforcement and Compliance (OECA) at the U.S. Environmental Protection Agency (EPA) is responsible for enforcing the country's environmental laws. On December 7, 2017, the U.S. Senate confirmed Susan Bodine to serve as the Assistant Administrator for OECA.¹ As Assistant Administrator Susan Bodine has emphasized that the EPA is committed to pursuing aggressively individuals and companies that violate environmental laws—more specifically, she has stated that “[a] strong enforcement and compliance assurance program is essential to achieving positive public health and environmental outcomes.”²

Under Ms. Bodine's leadership, OECA has focused on “expediting site cleanup, deterring noncompliance, and returning facilities to compliance with the law, while respecting the cooperative federalism structure of our nation's environmental laws.”³ On February 8, 2019, the EPA issued the Agency's 2018 annual environmental enforcement results highlighting the work that it accomplished in collaboration with state and tribal programs to ensure compliance with federal environmental laws.⁴ Some of the Agency's FY 2018 enforcement accomplishments, quoted verbatim from a recent press release issued by the Agency, include:

- Commitments to treat, minimize, or properly dispose of over an estimated 540 million pounds of waste;
- Commitments to reduce, treat, or eliminate 268 million pounds of pollution (air, toxics, and water);
- Commitments to clean up over 244 million cubic yards of contaminated soil and water;
- Prevention of the illegal importation of approximately 2,200 vehicles and engines that fail to comply with EPA emissions standards;
- Reduction of exposure to lead through 140 enforcement actions impacting lead paint against renovation contractors, landlords, property managers, realtors, and others;

¹ U.S. Environmental Protection Agency, *News Releases: U.S. Senate Confirms Susan Bodine to Lead EPA Enforcement Office* (Dec. 7, 2017), available at <https://www.epa.gov/newsreleases/us-senate-confirms-susan-bodine-lead-epa-enforcement-office>.

² U.S. Environmental Protection Agency, *News Releases: EPA Announces 2018 Annual Environmental Enforcement Results* (Feb. 8, 2019), available at <https://www.epa.gov/newsreleases/epa-announces-2018-annual-environmental-enforcement-results>.

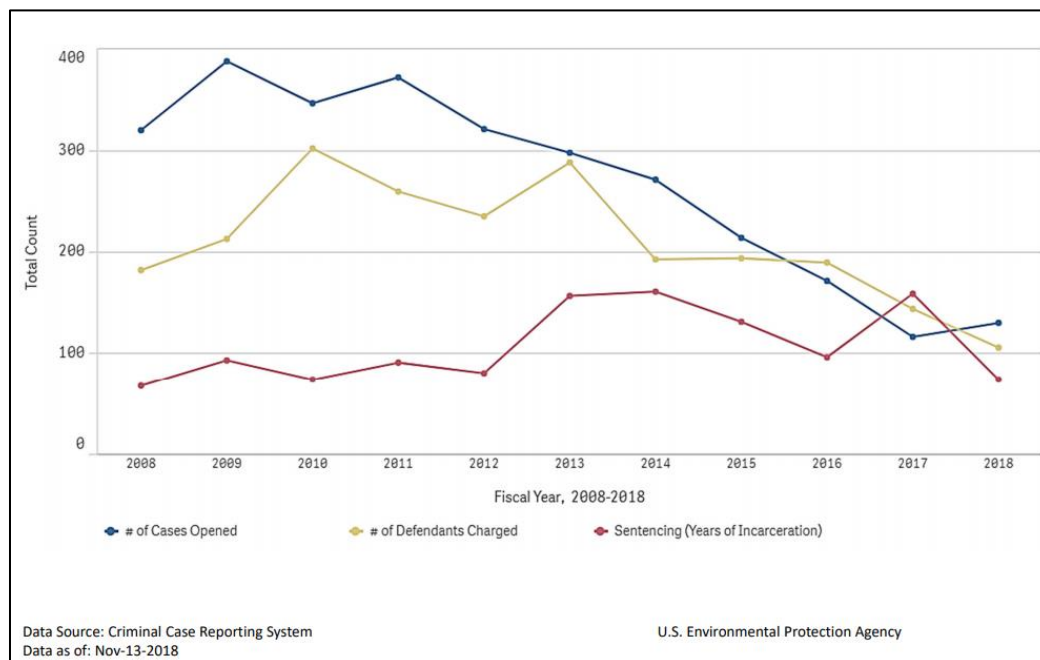
³ *Id.*

⁴ *Id.*

- Investment of nearly \$4 billion in actions and equipment that achieve compliance with the law and control pollution;
- Cleanups and redevelopment at over 150 sites through use of Superfund enforcement tools; and
- A total of 73 years of incarceration for individual criminal defendants.⁵

The EPA's FY 2018 enforcement results depict trends in enforcement over the past decade, and these graphs reveal that the number of criminal and civil enforcement cases opened by the EPA each year has gradually declined over the past ten years.⁶ For example, as depicted in Graph A below, the number of criminal cases opened has slowly declined from over 300 cases in 2008 to just over 100 cases in 2018. Fiscal year 2018 marked the first increase in the number of criminal enforcement cases opened since 2011.

Graph A: Criminal Enforcement: Environmental Crime Cases Opened, Defendants Charged, and Sentencing Results (Years of Incarceration) FY 2008 – FY 2018⁷



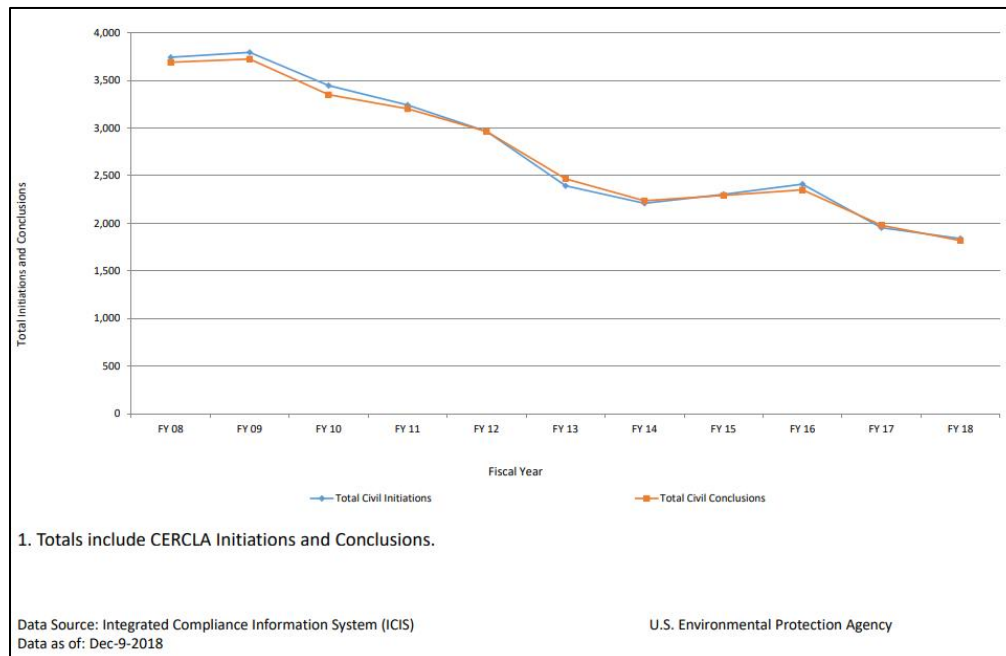
⁵ *Id.*

⁶ U.S. Environmental Protection Agency, *Fiscal Year 2018 EPA Enforcement and Compliance Annual Results* (Feb. 8, 2019), available at <https://www.epa.gov/sites/production/files/2019-02/documents/fy18-enforcement-annual-results-data-graphs.pdf>.

⁷ *Id.*

Similarly, the total number of civil enforcement cases initiated has been gradually declining over the past decade, and the number of cases initiated declined from between 3,500 and 4,000 cases in FY 2008 to between 1,500 and 2,000 cases in FY 2018.

Graph B: Total Civil Enforcement Case Initiations and Conclusions FY 2008 – FY 2018⁸



The EPA's FY 2018 enforcement results also depict other criminal enforcement accomplishments such as the values of fines and restitution and value of court ordered environmental projects and additional civil enforcement accomplishments such as federal inspections and evaluations conducted by the EPA, among other things.⁹ Oftentimes there is substantial variation in the value of fines and restitution and court ordered environmental projects due to large criminal cases. For example, the EPA's settlement with BP Exploration and Production Inc.,¹⁰ Duke Energy Corporation,¹¹ Volkswagen,¹² and Fiat Chrysler Automobiles,¹³ all had a substantial impact on the value of fines and restitution and court ordered environmental projects in certain years.

⁸ *Id.*

⁹ *Id.*

¹⁰ U.S. Environmental Protection Agency, *2013 Major Criminal Cases* (last visited Feb. 22, 2019), available at <https://www.epa.gov/enforcement/2013-major-criminal-cases>.

¹¹ U.S. Environmental Protection Agency, *Duke Energy Corporation Clean Air Act (CAA) Settlement* (Sept. 10, 2015), available at <https://www.epa.gov/enforcement/duke-energy-corporation-clean-air-act-cao-settlement>.

¹² U.S. Environmental Protection Agency, *Volkswagen Clean Air Act Civil Settlement* (last visited Feb. 22, 2019), available at <https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement>.

¹³ U.S. Environmental Protection Agency, *Fiat Chrysler Automobiles Clean Air Act Civil Settlement* (Jan. 10, 2019), available at <https://www.epa.gov/enforcement/fiat-chrysler-automobiles-clean-air-act-civil-settlement-information-sheet>.

b. Cooperative Federalism and the EPA's Goal to Enhance Collaboration with State, Tribal, Local, and Federal Partners

The EPA is committed to working closely with its state and federal partners to ensure compliance with federal laws, and the current Administration has emphasized the importance of enhancing states' role in environmental enforcement. For example, in the Agency's strategic plan for FY 2018 through 2022, the EPA emphasized its three core goals to: (1) refocus the agency on its core mission of providing Americans with clean air, land and water, and ensure chemical safety; (2) restore power to the states through cooperative federalism; and (3) adhere to the rule of law and lead the agency through improved processes.¹⁴ Under cooperative federalism, the state governments and the federal government must work together to implement and enforce federal environmental statutes.

After the Agency's release of its FY 2018-2022 Strategic Plan, Assistant Administrator Susan Bodine issued interim guidance on January 22, 2018, detailing the Agency's plans to prioritize cooperative federalism and compliance with the law and describing the working group that the EPA and the Environmental Council of the States (ECOS) created to accomplish these goals.¹⁵ In the memorandum, the EPA also discussed state primacy in authorized programs and noted that "[w]ith respect to inspections and enforcement, the EPA will generally defer to authorized States as the primary day-to-day implementer of their authorized/delegated programs, except in specific situations."¹⁶ The ECOS-EPA Workgroup issued their final report on August 23, 2018, summarizing the impact it has had so far and recommending that Assistant Administrator Bodine consider the workgroup's recommendations when updating the interim guidance in FY 2019.¹⁷

According to ECOS, the current Administration has improved the working relationship between the EPA and state environmental agencies. For example, in October 2018, ECOS issued a memorandum to its members noting that the "current administration is increasingly giving states a seat at the table" and encouraging members that "now is the time for [them] to create a real State and National Dialogue—STAND."¹⁸

¹⁴ U.S. Environmental Protection Agency, *Working Together: FY 2018-2022 U.S. EPA Strategic Plan* (Feb. 2018), available at <https://www.epa.gov/sites/production/files/2018-02/documents/fy-2018-2022-epa-strategic-plan.pdf>.

¹⁵ U.S. Environmental Protection Agency, *Memorandum: Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States* (Jan. 22, 2018), available at <https://www.epa.gov/sites/production/files/2018-01/documents/guidance-enhancingregionalstatecommunicationoncompliance.pdf>.

¹⁶ *Id.*

¹⁷ Environmental Council of the States (ECOS)-U.S. Environmental Agency (EPA) Compliance Assurance Workgroup, *Final Report* (Aug. 23, 2018), available at <https://www.ecos.org/wp-content/uploads/2018/09/Compliance-Assurance-Workgroup-Draft-1.0-August-23-2018-Final-1.pdf>.

¹⁸ Environmental Council of the States (ECOS), Letter from Todd Parfitt, ECOS Past President, Director, Wyoming Department of Environmental Quality and John Linc Stine, Commissioner, Minnesota Pollution Control Agency to ECOS Members (Oct. 25, 2018), available at <https://www.ecos.org/wp-content/uploads/2018/10/Fall-2018-CF-2.0-Message.pdf>.

c. The EPA's Emphasis on Compliance and the Various Tools that Can Be Used to Achieve Compliance

Enforcement is one of the many tools that the EPA and states can use to achieve compliance with environmental laws and regulations. In August 2018, Assistant Administrator Bodine issued a memorandum acknowledging that the best way to increase the environmental law compliance rate and reduce the average time from violation identification to correction was, among other things, to ensure that a broad range of compliance assurance tools are available for use. To help emphasize that the EPA's focus is increased compliance, the EPA is evolving the National *Enforcement* Initiatives (NEIs) program into the National *Compliance* Initiatives (NCIs) program.¹⁹

To transition from NEIs to NCIs, the EPA is making four major modifications to the program: “(1) modifying [the Agency’s] selection criteria for the FY 2020-2023 NCI cycle to better align with Agency Strategic Plan measures and priorities; (2) engaging more fully with states and tribes in the selection and development of the initiatives; (3) enhancing the EPA’s use of the full range of compliance assurance tools in an NCI; and (4) extending the priorities cycle to four years to better align with the Agency’s National Program Guide cycle.”²⁰ On February 8, 2019, the EPA issued a notice of public comment period soliciting public comment and recommendations on the NCIs to be undertaken in FY 2020 to FY 2023.²¹ The docket closes on March 11, 2019.²²

One of the changes in the EPA’s enforcement framework that has received a lot of attention is the EPA’s transition away from an enforcement approach that focused on specific industrial sectors to one that focuses on broader compliance with significant public health and environmental programs.²³ In the August 2018 memorandum, Bodine noted that “this initiative historically focused on one industrial sector, implying that the EPA considers all problems in this sector – large or small – to be a priority. For FY 2019, the EPA is clarifying that work under this NCI will focus on significant public health and environmental problems: exposure to significant releases of volatile organic compounds, reducing non-attainment, and reducing water quality impairment.”²⁴ According to an August 2018 article, while “these sectors will no longer be a focus of the federal enforcement program,” the sectors will “return to the core environmental

¹⁹ U.S. Environmental Protection Agency, *Memorandum: Transition from National Enforcement Initiatives to National Compliance Initiatives* (Aug. 21, 2018), available at <https://www.epa.gov/sites/production/files/2018-08/documents/transitionfromneitonci082118.pdf>.

²⁰ *Id.*

²¹ Federal Register, Vol. 84, No. 27, Public Comment on EPA’s National Compliance Initiatives for Fiscal Years 2020-2023 (Feb. 8, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-02-08/pdf/2019-01548.pdf>.

²² *Id.*

²³ Mike Soraghan, *Trump team phasing out oil field enforcement initiative*, E&E NEWS (Aug. 24, 2018), available at <https://www.eenews.net/stories/1060095163>.

²⁴ U.S. Environmental Protection Agency, *Memorandum: Transition from National Enforcement Initiatives to National Compliance Initiatives* (Aug. 21, 2018), available at <https://www.epa.gov/sites/production/files/2018-08/documents/transitionfromneitonci082118.pdf>.

programs that are implemented by the states in the first instance.”²⁵ Moreover, according to the article, this transition means that “EPA headquarters will no longer require regions to conduct minimum numbers of investigations and enforcement actions against entities in these sectors,” and instead “[t]he states and the EPA regional offices will have greater latitude to investigate and pursue potential noncompliance according to compliance patterns in their particular geographic areas without the previous oversight from the EPA headquarters.”²⁶

These changes were based, in part, on input and recommendations made by the ECOS-EPA Workgroup that was established to improve EPA-state collaboration on compliance assurance. In the ECOS-EPA Compliance Assurance Workgroup’s final report, the workgroup noted that:

This workgroup’s input and recommendations also directly influenced recent OECA decisions concerning EPA’s National Enforcement Initiatives (NEIs). In August 2018, OECA will change the name of the NEIs to the National Compliance Initiatives (NCIs) to emphasize that the agency’s goal is compliance, and that many tools—not just enforcement—can help reach that goal. EPA is increasing engagement with interested states and tribes in the selection and implementation of these initiatives. OECA is working with states on implementing existing NEIs and on developing new NCIs for the FY2020-FY2023 cycle.²⁷

d. Self-Disclosure Violations Policies

One of the additional compliance tools that the EPA uses is its self-disclosure violation policies. Through the EPA’s April 2000 Audit Policy entitled, “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,”²⁸ the Agency “safeguards human health and the environment by providing several major incentives for regulated entities to voluntarily discover and fix violations of federal environmental laws and regulations.”²⁹ In order for regulated entities to take advantage of the incentives, they “must voluntarily discover, promptly disclose to EPA, expeditiously correct, and prevent recurrence of future environmental violations.”³⁰ Incentives for the regulated entities to voluntarily disclose include significant penalty reductions, no recommendation for criminal prosecution, and no routine requests for

²⁵ Andrew Stewart and Richard Alonso, *A New Direction for EPA Enforcement Program*, LAW 360 (Aug. 31, 2018), available at https://www.sidley.com/-/media/publications/law360_a-new-direction-for-epa-enforcement-program.pdf.

²⁶ *Id.*

²⁷ Environmental Council of the States (ECOS)-U.S. Environmental Agency (EPA) Compliance Assurance Workgroup, *Final Report* (Aug. 23, 2018), available at <https://www.ecos.org/wp-content/uploads/2018/09/Compliance-Assurance-Workgroup-Draft-1.0-August-23-2018-Final-1.pdf>.

²⁸ Federal Register, Environmental Protection Agency, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations; Notice (Apr. 11, 2000), available at <https://www.govinfo.gov/content/pkg/FR-2000-04-11/pdf/00-8954.pdf> (last visited Feb. 21, 2019).

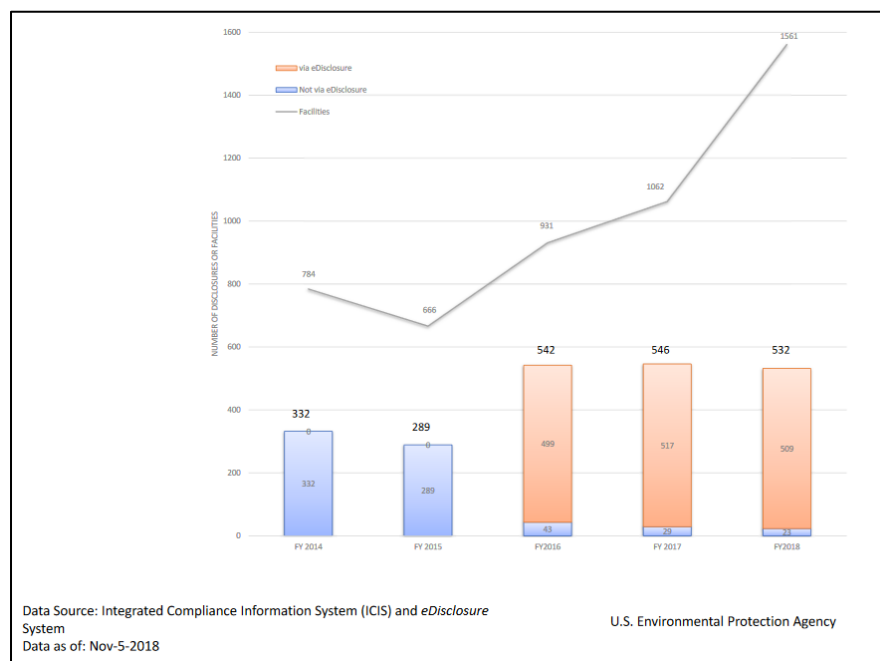
²⁹ U.S. Environmental Protection Agency, Compliance, EPA’s Audit Policy, available at <https://www.epa.gov/compliance/epas-audit-policy> (last visited Feb. 21, 2019).

³⁰ *Id.*

audit reports.³¹ According to the EPA’s Audit Policy, “a regulated entity has 21 days from the time it discovers that a violation has, or may have, occurred to disclose the violation in writing to EPA.”³² In addition, there are conditions that a regulated entity must satisfy to be eligible for Audit Policy benefits.

In December 2015, EPA took steps to modernize the “implementation of its violation self-disclosure policies by creating a centralized web-based ‘eDisclosure’ portal to receive and automatically process self-disclosed civil violations of environmental law.”³³ As a result, as depicted in Graph C below, the number of self-disclosures significantly increased in FY 2016 from FY 2015. While modernizing the program by adding the “eDisclosure” portal was a positive step taken by the previous administration to grow the agency’s self-disclosure program, some reports indicate that, prior to making these updates to the program, top officials during the Obama Administration had “suggested that resources in the agency’s regional office not be spent processing audit disclosures.”³⁴

Graph C: EPA Voluntary Disclosure Programs FY 2014 – FY 2018³⁵



³¹ *Id.*

³² *Id.*

³³ *Id.*; Federal Register, Vol. 80, No. 236, Notices, Environmental Protection Agency, Notice of eDisclosure Portal Launch: Modernizing Implementation of EPA’s Self-Policing Incentives Policies (Dec. 9, 2015), *available at* <https://www.govinfo.gov/content/pkg/FR-2015-12-09/pdf/2015-30928.pdf> (last visited Feb. 21, 2019).

³⁴ Timothy A. Wilkins and Jason B. Hutt, *EPA updates its Audit Policy with eDisclosure*, BRACEWELL LLP (Jun. 12, 2015), *available at* <https://www.lexology.com/library/detail.aspx?g=76e197c0-8a81-4ab9-b6d1-7df072990604>.

³⁵ U.S. Environmental Protection Agency, *Fiscal Year 2018 EPA Enforcement and Compliance Annual Results* (Feb. 8, 2019), *available at* <https://www.epa.gov/sites/production/files/2019-02/documents/fy18-enforcement-annual-results-data-graphs.pdf>.

In May 2018, EPA announced a renewed emphasis on encouraging regulated entities voluntarily to discover, disclose, correct, and take steps to prevent recurrence of violations. “Specifically, the EPA is taking steps to enhance and promote: (a) its already highly successful online “eDisclosure” program; (b) the additional flexibility available to new owners who self-disclose violations; and (c) opportunities to increase compliance through use of existing self-disclosure policies or tailored audit programs.”³⁶ While the number of entities that voluntarily disclosed to the EPA stayed roughly stagnant at 532, there was a sharp increase in the number of facilities incorporated in the FY 2018 voluntary disclosure program—rising from 1,062 facilities in FY 2017 to 1,562 facilities in FY 2018.³⁷

e. The Department of Justice’s Environmental and Natural Resources Division (ENRD)

OECA works with other federal agencies, such as the Department of Justice’s Environmental and Natural Resources Division (ENRD), to enforce the country’s environmental statutes. ENRD has primary responsibilities for litigation on behalf of the United States regarding environmental statutes.³⁸ In its 2017 report, ENRD highlighted that the division had obtained \$1.57 billion in civil penalties in 2017—which was the “second best year over the past 20 years” according to ENRD.³⁹ A significant portion of the money recovered in 2017 was from the Volkswagen settlement, but even excluding the Volkswagen penalty, ENRD recovered \$121 million in civil penalties, which is higher than the civil penalties ENRD recovered in 12 of the past 20 years.⁴⁰

³⁶ U.S. Environmental Protection Agency, Compliance, EPA’s Audit Policy, *available at* <https://www.epa.gov/compliance/epas-audit-policy> (last visited Feb. 21, 2019).

³⁷ U.S. Environmental Protection Agency, *Fiscal Year 2018 EPA Enforcement and Compliance Annual Results* (Feb. 8, 2019), *available at* <https://www.epa.gov/sites/production/files/2019-02/documents/fy18-enforcement-annual-results-data-graphs.pdf>.

³⁸ U.S. Department of Justice, Environment and Natural Resources Division (ENRD), *ENRD* (last visited Feb. 22, 2019), *available at* <https://www.justice.gov/enrd>.

³⁹ U.S. Department of Justice, Environment and Natural Resources Division (ENRD), *ENRD Summary of Division Accomplishments Fiscal Year 2017* (Apr. 27, 2018), *available at* <https://www.justice.gov/enrd/page/file/1058046/download#2017%20PDF>.

⁴⁰ *Id.*